To be argued by:
THOMAS A. HARNETT

United States Court of Appeals

FOR THE NINTH CIRCUIT.

Docket No. 17609

ALBIN STEVEDORE COMPANY,
a Washington Corp.,
Appellant,

v.

CENTRAL RIGGING & CONTRACTING CORPORATION,
Appellee.

On Appeal from the United States District Court Western District of Washington: Northern Division

BRIEF FOR PLAINTIFF-APPELLANT.

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Statement.

This is an appeal by the Plaintiff-Appellant, Albin Stevedore Company (hereafter called Appellant) from the order of the United States District Court for the Western District of Washington, Northern Division granting summary judgment in favor of the Defendant-Appellee, Central Rigging & Contracting Corporation (hereafter called Appellee) and from each and every part of said order. [Transcript of Record,* p. 134, Order Granting Summary Judgment; p. 135, Notice of Appeal]

The District Court thus held that both the first and second causes of action set forth in the action before that

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*(All references hereinafter are to the Transcript of Record and will be designated TR with a reference to the page number thereof and wherever possible to the line or paragraph on said page.)

Court had been submitted to the arbitrators appointed by the American Arbitration Association. This appeal brings before this Court these questions, i.e., the scope of the arbitration proceedings, the extent of the arbitrators' jurisdiction and the extent of the arbitrators' award. The Appellant contends that the District Court improperly entered an order granting summary judgment in favor of the Appellee and in denying the Appellant's motion for summary judgment.

This Action.

Appellant, a Washington Corporation, commenced this action in the Superior Court of the State of Washington, King County [TR p. 6]. The Appellee, a New York Corporation, removed this action from the Washington State Court to the United States District Court for the Western District of Washington—Northern Division. The removal was based on the parties' diversity of citizenship [TR p. 1-3 Petition for Removal].

THE PLEADINGS

a. Complaint

The complaint alleged two causes of action. The first cause of action sought the recovery of $6,000, the balance due on a written contract containing an agreed price of $14,000 for work, labor and services performed by the Appellant as a stevedore in the loading of specified cargo on board the vessel *"Despina C"*. The agreed price for the work was $14,000, $8,000 of which was paid during the progress of the work and the balance of $6,000 was to be paid upon the completion. The Appellant performed this work. The Appellee conceded the indebtedness but had only paid $8,000 and failed to pay the balance of $6,000 [TR p. 6, ¶ V of the First Cause of Action of the Complaint].

The second cause of action was for additional work that the Appellant was required to do at the request of the

Appellee and for this Appellant sought the recovery of $16,067.97 [TR pp. 6, 7, 8, ¶s I through and including IX, the Second Cause of Action of the Complaint].

b. Answer

The Appellee answered the complaint, denied that there was an agreed price to perform the work, denied the fact that the balance of the payment of $6,000 was due and owing to the Appellant by reason of the failure of the Appellant to tender to the Appellee an affidavit of receipt of full payment as a condition for receiving any balance due under the contract [TR p. 69, ¶ 5, Answer].

With regard to the second cause of action, the Appellant pleaded a general denial [TR pp. 67, 70]. In addition the Appellee alleged an affirmative defense that the Appellee was ready and willing to arbitrate pursuant to the Rules of the American Arbitration Association.

c. Motion of Appellee for a Stay of the Action

The Appellee moved in the District Court for a stay of the litigation pursuant to the provisions of 9 U. S. C. 3 [TR pp. 11-13]. The Appellant cross moved to enjoin the arbitration proceedings [TR pp. 40 through and including 72]. The Appellant's motion was denied and a stay of the litigation was granted Appellee, pursuant to 9 U. S. C. section 3 [TR p. 72, lines 11 through and including 20]. The Appellant served a notice to appeal that decision [TR p. 73]; the appeal was voluntarily dismissed [TR pp. 74, 75] and the dismissal was granted on February 7, 1961 [TR p. 76]. Thereafter the Appellee commenced arbitration proceedings [TR pp. 34-39 at 38, 39, Original Demand; TR pp. 85-87 at 86, Amended Demand].

ARBITRATION PROCEEDINGS

a. Appellee's Demand for Arbitration

On January 19, 1960, by an amended demand for arbitration, the Appellee demanded arbitration in accordance

with Paragraph 22 of a written contract between the parties [TR pp. 85 through and including 87].

The Appellee specified the following demand for arbitration:

"II

Demand for Arbitration.

"Central Rigging & Contracting Corp. hereby demands arbitration on the following disputes which are subject to arbitration under the above quoted clauses, and designates New York City as the place of arbitration.

"Central Rigging & Contracting Corp. hereby disputes and contests a claim of Albin Stevedore Company for the sum of $22,067.97, and each and every part thereof, *to the extent that said claim exceeds the sum of $6,000.* Said claim has been made by Albin Stevedore Company against Central Rigging & Contracting Corp. for payment of work performed which was required by the aforesaid contract. *The said disputed claim of Albin Stevedore Company for sums in excess of $6,000* is based on the additional expense of Albin Stevedore Company in performing said contract caused by the alleged failure of Central Rigging & Contracting Corp. to furnish a ship with 45 ton boom and with other adequate loading equipment as allegedly required by the terms of the aforesaid contract . . ." [TR pp. 86, 87, Emphasis supplied].

b. Appellant's Answering Statement

By its answering statement Appellant acknowledged the Appellee's admission "that the sum of $6,000 is payable to Albin Stevedore Company for services rendered in loading and stowing of certain equipment on board the vessel *'Despina C'*. Accordingly, Albin Stevedore Company hereby demands that the said sum of $6,000 be paid to it forthwith" [TR pp. 89-90].

And

> "In addition to the said $6,000 about which there is no dispute, Albin Stevedore Company is owed an additional sum of $16,067.97 . . ." [TR p. 90].

Thus the Appellant sought payment forthwith of the sum of $6,000 [TR p. 90] and an award in the sum of $16,067.97 together with interest at the rate of 6 per cent from September 3, 1959 [TR p. 92].

The arbitration was subject to the Commercial Arbitration Rules of the American Arbitration Association [TR p. 17 ¶ 11 incorporating by reference p. 14 ¶ 22]. These rules are set forth fully in the Transcript of Record and marked Exhibit A commencing at Page 84.

In the "Instructions for Proceeding Under These Rules" it stated that the demand for arbitration should include ". . . 3) Brief but specific statement of the dispute(s) to be arbitrated, amount claimed, if any, and the relief sought . . ." [TR p. 84, third page of Exhibit A].

Section 7, subdivision a, of the rules provides that the proceedings are initiated:

> ". . . a. By such party giving written notice to the other party which notice shall contain *a statement setting forth the nature of the dispute, the amount involved, if any, the remedy sought . . .*"

The Rules further provide as follows:

> "Section 8. CHANGE OF CLAIM—After filing the claim, an answer if any, if either party desires to make any new or different claim, such claim shall be made in writing with the Tribunal Clerk and a copy thereof mailed to the other party who shall have a period of seven days from the date of such mailing within which to file an answer with the Tribunal Clerk . . ." [TR p. 84, fifth page of Exhibit A, emphasis supplied].

It is the position of the Appellant that the effect of the demand for arbitration and the answer, provided for in the Commercial Arbitration Rules, governs the scope and extent of the controversy submitted to the arbitrators. Neither party sought or obtained a "Change of Claim."

c. The Arbitration Hearing, the Award and the Confirmation

Following a hearing and within the period prescribed by the rules, the arbitrators made the following award:

> "We the Undersigned Arbitrators have been designated in accordance with the Arbitration Agreement entered into by the above named parties and dated August 14, 1959, and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD, as follows:
>
> 1) Central Rigging & Contracting Corp. hereinafter referred to as Central, shall pay to Albin Stevedore Company, hereinafter referred to as Albin, the sum of NINE THOUSAND FIVE HUNDRED DOLLARS ($9,500.00) plus interest at the rate of six per cent (6%) per annum from September 18, 1959, to the date of this award in *full settlement of all claims submitted to this arbitration* . . ." [TR p. 95; emphasis is ours.]

Thereafter this award was confirmed in the Supreme Court of the State of New York (the site of the Arbitration and the law of which state governs the parties' rights as set forth in their contract). A judgment for $9,500 plus interest, covering the claims submitted to arbitration, was entered in the New York County Clerk's Office and has been satisfied.

The Post Arbitration Proceedings in the District Court.

(Motion and Cross Motion for Summary Judgment)

Following the arbitration, the award and the confirmation in the Supreme Court of the State of New York, the Appellant moved to vacate the stay in the District Court and for summary judgment in its favor on the first cause of action, i.e., for the sum of $6,000 on the ground that the first cause of action had not been submitted to the arbitrators because the demand for arbitration embraced solely a dispute of the "*claim of Albin Stevedore Company*

for the sum of $22,067.97 and each and every part thereof to the extent that said claim exceeds the sum of $6,000 * * *'' [TR p. 86, Emphasis supplied.]

The District Court denied Appellant's motion and granted summary judgment in favor of Appellee on its motion [TR p. 134].

Statement of Points on Which the Appellant Intends to Rely on in the Appeal.

1. Appellee's demand for arbitration and Appellant's answering statement were the source and definition of the authority exercised by the arbitrators.

2. The parties submitted to the arbitrators but one dispute, namely, Appellant's claim set forth in its SECOND CAUSE OF ACTION, being the excess over and above the sum of $6,000.00 admitted to be due.

3. The arbitrators had no jurisdiction to consider anything except the subject of Appellant's SECOND CAUSE OF ACTION, namely, the excess amount owing from Appellee to Appellant over and above the $6,000.00 admitted to be due.

4. The subject matter of Appellant's FIRST CAUSE OF ACTION, namely, the $6,000.00 admitted to be owing from Appellee to Appellant was not submitted to the Arbitrators for decision.

5. The Court erred in granting Appellee's motion for summary judgment.

6. The Court erred in refusing to grant Appellant's motion for summary judgment.

Appellant's Contentions.

1. The sole dispute that the Appellee submitted to arbitration was "the sum of $22,067.97 and each and every part thereof *to the extent that said claim exceeds the sum*

of $6,000.'' [Part II of the ''Amended Demand for Arbitration Against Albin Stevedore Company''. See TR p. 86.]

2. The power, jurisdiction and authority of the Arbitrators was limited to the dispute the parties submitted to them.

3. The Arbitrators' award was solely ''in full settlement of all claims submitted to this arbitration'' [TR p. 95].

4. In view of the fact that Appellee conceded that the sum of $6,000.00, the amount demanded in the first cause of action, was due and owing to Appellant, there was no issue of fact thereon and summary judgment for that amount should have been granted in Appellant's favor.

I.

The sole dispute that the appellee submitted to arbitration was "the sum of $22,067.97 and each and every part thereof to the extent that said claim exceeds the sum of $6,000.00"

Appellee's Demand for Arbitration and Appellant's Answering Statement Were the Source and Definition of the Authority Exercised by the Arbitrators.

The Appellee made the demand for arbitration and framed the issue on which it desired the arbitrators' action and decision. Appellee stated its dispute in precise language as follows:

> ''II
>
> Demand for Arbitration
>
> ''Central Rigging & Contracting Corp. hereby demands arbitration on the following disputes which are subject to arbitration under the above quoted clauses, and designates New York City as the place of arbitration.
>
> ''Central Rigging & Contracting Corp. hereby disputes and contests a claim of Albin Stevedore

> Company for the sum of $22,067.97, and each and every part thereof, *to the extent that said claim exceeds the sum of $6,000.* Said claim has been made by Albin Stevedore Company against Central Rigging & Contracting Corp. for payment of work performed which was required by the aforesaid contract. *The said disputed claim of Albin Stevedore Company for sums in excess of $6,000* is based on the additional expense of Albin Stevedore Company in performing said contract caused by the alleged failure of Central Rigging & Contracting Corp. to furnish a ship with 45 ton boom and with other adequate loading equipment as allegedly required by the terms of the aforesaid contract . . .'' [TR pp. 86, 87, Emphasis supplied].

By the terms of the written contract between Appellant and the Appellee, the law of New York was chosen to govern the parties' rights and New York was the designated site for the arbitration proceeding. In New York, the power of arbitrators is confined strictly to the matters submitted to them for determination and beyond that authority the arbitrators have no jurisdiction. 21 *Carmody-Wait, Cyclopedia of New York Practice,* Section 94, p. 495.

Historically, this view has been pronounced and repeated from the nineteenth century to date. Thus, in *Jones* v. *Welwood,* 71 N. Y. 208 (1877), the highest court of that state said:

> ''Arbitration contracts should be construed like other contracts, and the same rule applied with a view of arriving at the intent of the parties . . . The general rule, as now settled, is well expressed by Mr. Morse in his work on arbitration, page 342. 'The Court will look at the language of the submission in its every part and from a consideration of the whole, will determine the matter of intent. If the reasonable construction appears to be that the parties intended to have everything decided, if anything should be, then a decision of all matters submitted will be imperatively required; . . . but if anything in the submission indicates a contrary purpose an award determining a part only of the matters submitted will be sustained' '' (71 N. Y. 208, at 213).

Some twenty-seven years later, an intermediate appellate court stated in *Cullen & Dwyer* v. *Shipway,* 78 App. Div. 130, 79 N. Y. S. 627; aff'd (no op.) 177 N. Y. 571, 69 N. E. 1122 (1904) as follows:

> "* * *
>
> "The rule seems to be well settled that the power of arbitrators is confined strictly to the matters submitted to them for determination and any award made on any other subject is void (*Dodd* v. *Hakes,* 114 N. Y. 263). In the case just cited the court said: 'The law is well settled that the power of arbitrators is confined strictly to the matters submitted to them, and if they exceed that limit, their award will in general be void.
>
> "They cannot decide upon their own jurisdiction, nor take upon themselves authority by deciding that they have it but must, in fact have it under the agreement of the parties whose differences are submitted to them before their award can have any validity, and the fact of jurisdiction, when their decision is challenged, is always open to inquiry.'
>
> "Here the arbitrators were not asked to construe contract No. 1 or determine its legal effect, and when the third arbitrator proceeded to do that he was doing what the parties had never agreed he should do, and as already stated, he therefore, acted without jurisdiction. His award was void and was properly so held by Special Term" (78 App. Div. 130, 132).

Likewise, in *Conway* v. *Roth,* 179 App. Div. 108, 166 N. Y. S. 108 (1st Dept. 1917), the court said:

> "Parties to a statutory arbitration have no power to confer jurisdiction upon arbitrators over subject matters which they would not have under a written submission . . . The arbitrators sit as a court with no powers except those conferred by the written submission duly executed and acknowledged."

More recently, in 1946, in Supreme Court Special Term, New York County, in the *Matter of the Arbitration Between Transport Workers Union of America, CIO and 5th Avenue Coach Co.,* 187 Misc. 247, 63 N. Y. S. 2d 17 the Court relied

on the authority of *Jones* v. *Welwood, supra,* and stated at p. 249:

> "The submission to arbitration clothed the arbitrator with jurisdiction to hear and determine the specific issues which the parties by their voluntary agreement, designated as the subjects to be determined by him. The submission is, at one and the same time, the source and definition of the authority to be exercised by the arbitrator."

At page 252, the Court further stated:

> "Apparently the arbitrator overlooked the force of the submission of February 14, 1946. The submission was a contract that was as binding upon him, upon qualifying as an arbitrator as it was upon the parties. *Whatever may have been the attitude of the parties in October, 1945, the submission plainly fixed the status of the dispute as it existed on February 14, 1946, and enumerated the items which were required to be adjudicated by the arbitrator."* [Emphasis supplied.]

See also:

> *Matter of Wilkins,* (1902), 169 N. Y. 494, 496, 62 N. E. 575.

The law of New York, in this regard, was succinctly restated in a recent case involving the Appellee in this action, in fact in an arbitration proceeding that is collateral to this matter and was included in the original demand for arbitration of the matters under consideration [TR pp. 34-39, inclusive] *Matter of Central Rigging & Contracting Corp'n. (Howard International, Inc.),* [Supreme Court, N. Y. Co.—*New York Law Journal,* Oct. 14, 1961, p. 13, col. 4 (not yet otherwise reported)]. The Court stated:

> "Arbitration is a matter of agreement (*Lehman* v. *Ostrovsky,* 264 N. Y. 103). The agreement here was to arbitrate 'in accordance with the Rules of the American Arbitration Association' and the respondent was not called upon to arbitrate in any other manner . . .

> "Likewise, the law is well established that the power of the arbitrator is limited by the terms of the submission and that an award which exceeds the scope of the submission will be vacated. The arbitrators may not write a new contract for the parties without such parties' consent nor may they assume authority by merely deciding that they have it (*Western Union Telegraph Co.* v. *Am. Communications Ass'n C. I. O.*, 299 N. Y. 177; *Dodds* v. *Hakes*, 114 N. Y. 260; *Halstad* v. *Seaman*, 82 N. Y. 27.)"

Basically speaking, this view is not peculiar to the law of the State of New York but appears to be the prevailing law throughout the United States since early times. The indications of this fact are demonstrated in opinions of the United States Supreme Court such as *McCormick* v. *Gray* (1851), 13 How. 26, 54 U. S. 26 at p. 38, 14 L. Ed. 36; *The York and Cumberland R. R. Co.* v. *Myers* (1855), 59 U. S. 246, 15 L. Ed. 380. In the latter case, at page 252, the Supreme Court said: "The law is well settled that by the reference of an action to arbitrators, nothing is included in the submission but the subject matter involved in it . . ."

The current weight of authority in this country is that an arbitrator's jurisdiction or authority to act is derived from and limited by the arbitration agreement or submission which forms the basis of their award and it is essential that the award conform to, and comply with, the arbitration submission or agreement. 6 C J S, *Arbitration & Award*, §80, pp. 219-220; 3 Am. Jur. 945-946, *Arbitration & Award*, §123. Moreover, the authority of the arbitrators is derived from the arbitration agreement and is limited to a decision of the matters submitted therein either expressly or by necessary implication. 6 C J S, *Arbitration & Award* §27 c, pp. 167-168.

See also:

> *Fortune* v. *Killebrew*, 86 Tex. 172, 23 S. W. 976;
> *Gulf Oil* v. *Guidry*, 160 Tex. 144, 227 S. W. 2d 406, 408;

Pancoast v. *Russell,* 148 Cal. App. 2d 909, 914, 307 P. 2d 719;
Crofoot v. *Blair Holding,* 119 Cal. App. 2d 156, 184, 260 P. 2d 156, 171.

As recently as 1960, a District Court of Appeal of the State of California in *William B. Logan & Associates* v. *Monogram Precision Industries,* 184 Cal. App. 2d 12; 7 Cal. Rptr. (West's) 212, decided a case which involved language of a submission almost identical in form to that now before this Court. In that case, the parties agreed that they

> "Submit to the American Arbitration Association, all rights and claims that they have in, to, and concerning *the amount whereby the claim for the period of May 13 through May 25 exceeds $2,400.00* and the items covered *thereby* and all disputes concerning *the same,* including but not being limited to the reasonableness and authorization *thereof,* and the determination of all rights and claims they may have in, to, and concerning the amount of $951.00 claimed as traveling expenses . . ." [Emphasis is the Court's] 184 C. A. 2d 14.

The Court, after setting forth this language said:

> "The arbitrator awarded $3,000.00 in settlement of the amount of fee in dispute and $610.50 for traveling expenses. There is no issue concerning the travel item and all of the issues arise out of the arbitration agreement's meaning and effect insofar as concerns item (2). [Set forth above]"

There the appellant contended that the contract was amenable but to one interpretation in that the quoted phrase submitted to arbitration only the reasonableness of the amount by which the claim of $4,675.00 exceeded $2,400.00 for services during the particular period including reasonableness and authorization of services included in such excess. The theory was that the word "disputes" could refer only to the claims recited because of the fact that all

other items had been separately settled. The respondent contended that "disputes" refers generally to "amount" and that reasonableness thereof can be in excess of the amounts originally claimed. It was argued that otherwise the contract would be ambiguous and unclear as to what "all disputes concerning the same" refers to in the agreement.

In evaluating and passing upon the contentions raised by the parties, the Court at 184 C. A. 2d 15 stated the generally recognized rules that if the language of a contract is clear and certain and there is no ambiguity, parol evidence is inadmissible to vary its meaning and that if it is in writing, such contract represents a complete integration of previous negotiations and the contractual understanding of the parties.

At 184 C. A. 2d 15, the Court stated:

> "In our opinion there is no ambiguity in the terms of the arbitration agreement. On its face, it is not fairly susceptible of two interpretations . . . nor is its meaning obscure . . . The agreement clearly reflects that there were only two items relating in the dispute between the parties. As concerns item (2) there is no ambiguity in the specific provision attached nor is it rendered uncertain by reference to any other portion of the agreement or to the surrounding circumstances . . ."

The Court said at 184 C. A. 2d 17 as follows:

> "There is, however, a fundamental distinction between cases wherein the act is equivocal and the evidence of the intent of the party is competent and relevant to establish its legal effect, and those cases where the *terms* of an agreement are set forth in writing and the words are not equivocal or ambiguous. In the latter cases . . . 'the writing or writings will constitute the contract of the parties, and one party is not permitted to escape from its obligation by showing that he did not intend to do what his words bound him to do.' *By the same token, neither will such party be permitted to reap more benefit from a contract than its language permits.*" [Latter emphasis is supplied.]

In concluding, the Court then stated the following rule which we assert is the rule to be followed here:

> "While every intendment of validity must be given an arbitration award (*Sampson Motors, Inc.* v. *Roland,* 121 Cal. App. 2d 491 [263 P. 2d 445]), it is well settled that an arbitrator derives his power from the arbitration agreement and he cannot exceed his derived power. (*Crofoot* v. *Blair Holdings Corp.,* 119 Cal. App. 2d 156 [260 P. 2d 156].) To confirm an award in excess of the powers granted by an arbitration agreement would destroy the very purpose of arbitration and be contrary to the sound policy of encouraging the settlement of private disputes by the voluntary agreement of the parties. Since the arbitrator here exceeded the express limitations of the agreement, the superior court must make an order vacating the award. (*Flores* v. *Barman,* 130 Cal. App. 2d 282 [279 P. 2d 81].)" [184 C. A. 2d 17]

The Appellant contends that the demand for arbitration and the answering statement are not ambiguous and are clear and precise and that only one question was submitted to the arbitrators by these parties, i.e., a dispute as to

> "The sum of $22,067.97 and each and every part thereof *to the extent that said claim exceeds the sum of $6,000.00.*" [Part II of the "Amended Demand for Arbitration against Albin Stevedore Company.", TR p. 86; emphasis supplied.]

The Appellee and the Appellant never submitted to the arbitrators as a dispute the sum of $6,000.00 which is the demand in the first cause of action. The authority of the arbitrators never extended to the question of whether $6,000.00 was due to Appellant under the written contract and that sum could not validly be and was not embodied in any award rendered by the arbitrators.

The District Court had jurisdiction of the controversy set forth in the first cause of action and because that sum was admittedly due the Appellant the District Court should have granted summary judgment in the sum of $6,000.00

with interest from September 18, 1959, in favor of the Appellant.

The Arbitrators' Award was Solely "In Full Settlement of All Claims Submitted to this Arbitration." Therefore, There was No Decision by the Arbitrators Except as to Matters Submitted to Them and in Dispute Before Them.

In the District Court the Appellee maintained that both the first and second causes of action were determined by the award of the arbitrators. We contend that this position is not justified in the light of the facts and the law applicable to the facts.

Initially, we respectfully point out that the award itself states ". . . this award [is] in full settlement of all claims submitted to this arbitration." [TR p. 95] Thus, the arbitrators chose simple language to show the extent of the award, *i.e.,* the claim submitted to them. That claim was "the sum of $22,067.97 and each and every part thereof to the extent said claim exceeds the sum of $6,000." [Part II of the "Amended Demand for Arbitration". TR pp. 86-87.]

When an arbitration award is free from corruption or misconduct on the part of the arbitrators, the court indulges every reasonable intendment and presumption (*Byers* v. *Van Deusen* (1830), 5 Wend. 268, 269) so as to give effect to the proceedings of the arbitrators and to favor the regularity and the integrity of their acts. Conversely, nothing will be presumed for the purpose of overturning it. (*Nichols* v. *Renssalaer Co. Mut. Ins. Co.,* 22 Wend. 125). Likewise, a court will not presume that arbitrators have decided matters not in dispute. [21 *Carmody-Wait, Cyclopedia of New York Practice,* Sec. 148, at pp. 548-550].

Also it has been stated that even if the words of an award are so comprehensive that they may take in matters not written in the submission, it is presumed that nothing beyond it was awarded, unless the contrary is expressly shown, or appears on the face of the record [*Carmody-Wait, op. cit.* Vol. 21, Sec. 148, at pp. 549-550]. In other

words, it is a fundamental requisite of an award that it shall be coextensive with the submission. *Jones* v. *Welwood* (1877), 71 N. Y. 208; 10 *Carmody on New York Pleadings and Practice,* §1196-1198.

In *Fudicker* v. *The Guardian Mutual Life Ins. Co.* (1875), 62 N. Y. 392, the court stated the well settled principle governing arbitration, which should not be overlooked, namely that all reasonable intendments and presumptions are indulged in support of the award.

The award and decision of the arbitrators clearly reflects that the arbitrators concerned themselves solely with the "claims submitted to this arbitration".

The Appellant moved in the Supreme Court of the State of New York to confirm that award. Appellant's motion was granted on consent of the Appellee and without any opposition. The Court's decision reads:

> "Albin Stevedore Co. (Central Rigging & Contracting Corp.) Motion to confirm the award of the arbitrators is granted, there being no opposition. Since, however, the respondent was ready to pay the award and so informed the petitioner's attorneys, the petitioner should recover no costs in this proceeding to confirm. Settle order." [TR p. 115]

The moving papers submitted by the Appellant at the time of the motion fully apprised the New York Court of the position of the Appellant, which is the same here. In Paragraph "7" of the affidavit of Thomas A. Harnett, read in support of that Motion, the scope of the controversy submitted to arbitration was fully set forth therein with references made to the Respondent's Amended Demand for Arbitration and the Petitioner's Answering Statement in reply thereto. The scope of said Arbitration was clearly set forth in the moving papers and was succinctly stated therein, to wit,

> "A single controversy, to wit, the sum, if any, in excess of $6,000 due and owing to Albin for work and services performed in the loading of the DESPINA C . . ." [TR p. 126]

The New York Supreme Court did not determine substantively, by reason of the form of the order it signed, that the arbitration award embraced the two causes of action as the Appellee has contended in its moving affidavits on its motion for summary judgment [TR pp. 115-118]. The sole reason the Supreme Court, New York County, signed the counter-order submitted by the Appellee [TR pp. 98-99 and TR pp. 130-131] was that the form of the Appellant's order [TR pp. 123-124] was improper in that it contained a factual finding or decisional discussion. It is the practice in New York that orders "should not contain any factual findings or decisional discussions", *New York Civil Practice Act,* §127; *New York Rules of Civil Practice,* 70-74. Similarly, there is decisional law to this effect, i. e., *White* v. *White,* 175 Misc. 66, 22 N. Y. S. 2d 776; and *Ayman* v. *Teachers Retirement Board,* 19 Misc. 2d 374, 193 N. Y. S. 2d 2, modified 9 N. Y. 2d 119, 172 N. E. 2d 571.

The Justice of the New York Supreme Court by signing the Appellee's counter-order did not make a substantive ruling as to the scope, extent and nature of the dispute submitted to the arbitrators and neither the District Court nor this Court are precluded from making such a substantive ruling on the summary judgment motions presented by the parties.

Based upon the language employed by the parties, particularly the Appellee in its demand for arbitration, and the form of the award made by the arbitrators, there is no doubt that the sole dispute that the parties submitted to arbitration was "the sum of $22,067.97 and each and every part thereof *to the extent that said claim exceeds the sum of $6,000.00.*" [Part II of the "Amended Demand for Arbitration against Albin Stevedore Company", TR p. 86.]

II.

This Court and the District Court are required to presume that the arbitrators decided only the matters submitted to them and put before them.

The Presumption of Regularity of the Proceedings and the Award is so Great That no Parol Inquiry May be Made of the Arbitrators Either by the Court or the Parties.

The arbitrators' award in its clear and specific language stated:

> ". . . 1. Central Rigging & Contracting Corp. hereinafter referred to as Central, shall pay to Albin Stevedore Company, hereinafter referred to as Albin, the sum of NINE THOUSAND FIVE HUNDRED DOLLARS ($9,500.00) plus interest at the rate of six per cent (6%) per annum from September 18, 1959, to the date of this award *in full settlement of all claims submitted to this arbitration.*" [TR p. 95; emphasis supplied.]

The award relates solely to the claims ". . . submitted to this arbitration" and the sole matter submitted for the arbitration was the sum in excess of $6,000.00 (*supra,* p. 6; p. 4). Thus, it remained for the District Court to determine the rights of the parties as to the demand set forth in the first cause of action seeking damages in the sum of $6,000.00. That amount was admittedly due to the Appellant. The Appellant's motion for summary judgment should have been granted and the Appellee's cross motion for summary judgment should have been denied.

As previously stated in our first point, it must be presumed that the arbitrators decided only the matters submitted to them (*supra*, pp. 16-18).

It is a fundamental requisite of an award that it shall be coextensive with the submission. *Jones* v. *Welwood*

(1877), 71 N. Y. 208; 10 *Carmody on New York Pleading and Practice,* §1196-1198.

Except for certain statutory grounds, an arbitration award must stand. These grounds are set forth in Section 1462 of the Civil Practice Act of the State of New York.

Section 1462 of the Civil Practice Act of the State of New York sets forth the specific grounds authorizing the vacating of an award. These may be summarized as follows:

1. Where the award is procured by corruption, fraud or other undue means.

2. Where there was evident partiality or corruption in the arbitrators.

3. Where the arbitrators were guilty of misconduct in refusing to postpone a hearing upon sufficient cause; or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of a party have been prejudiced.

4. Where the arbitrators exceeded their powers or so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted was not made.

5. Where there was no valid submission or contract and an objection had been raised under the conditions set forth in Section 1458.

The New York Courts have repeatedly held that they will not interfere with an award made by arbitrators who have acted impartially within the powers conferred upon them, in the absence of a showing that one of the grounds specified in Section 1462 of the New York Civil Practice Act exists. Illustrative of this view is *D. Goff & Sons* v. *Rheinauer,* 199 App. Div. 617, 192 N. Y. S. 82 (1s Dept. 1922) and *C. Stoh & Co.* v. *Bayer Oil Co.,* 198 App. Div. 881, 191 N.Y.S. 290 (1st Dept. 1921).

The New York Court of Appeals, a court of last resort, has similarly ruled in *Matter of Wilkins* (1902), 169 N. Y. 494 at page 496 (62 N. E. 575):

"When the merits of a controversy are referred to an arbitrator selected by the parties, his determination, either as to the law or the facts, is final and conclusive, and a court will not open an award unless perverse misconstruction or positive misconduct upon the part of the arbitrator is plainly established, or there is some provision in the agreement of submission authorizing it. The award of the arbitrator cannot be set aside for mere errors of judgment either as to the law or as to the facts. If he keeps *within his jurisdiction* and is not guilty of fraud, corruption or other misconduct affecting his award, it is unassailable, operates as a final and conclusive judgment, and however disappointing it may be the parties must abide by it. *Hoffman* v. *DeGraff*, 109 N. Y. 638; *Masury* v. *Whiton*, 111 N. Y. 679; *Sweet* v. *Morrison*, 116 N. Y. 19, 27; *Perkins* v. *Giles*, 50 N. Y. 228; *Fudicker* v. *Guardian Mut. Life Ins. Co.*, 62 N. Y. 393."

In 1956, the Appellate Division First Department, an intermediate appellate court, had under review a case where a party contended an arbitrator did not understand the full import of an award and had testimony taken to that effect. The Court in *Matter of Arbitration of Weiner (Freund)*, 2 App. Div. 2d 341 said at pp. 342-3 [Later (1957) aff'd (no op.) 3 N. Y. 2d 806, 144 N. E. 2d 647].

"* * *

"In essence, the award gave respondent credit for unused materials returned and allowed the counterclaim in an amount in excess of the purchase price of the goods.

"Motions to vacate an award pursuant to section 1462 of the Civil Practice Act, or to modify or correct awards pursuant to section 1462-a of the Civil Practice Act, must be granted only for the specific reasons set forth in the enumerated sections (*Matter of Wilkins*, 169 N. Y. 494). The nub of this case is the claim that the impartial arbitrator did not intend the consequences of the award to which he agreed. The Civil Practice Act does not permit either vacating or correcting an award upon that ground.

"More than a century ago it was held that parol evidence, even of an arbitrator to contradict or impeach an award, was inadmissible. *Doke* v. *James,* 4 N. Y. 568, 575.

"An arbitrator should not be called upon to give a reason for his decision. Inquisition of an arbitrator for the purpose of determining the processes by which he arrives at an award finds no sanction in law. *Bernhardt* v. *Polygraphic,* 350 U. S. 198, 203; *Matter of Shirley Silk Co.* v. *American Silk Mills,* 257 App. Div. 375, 377.

"These parties by agreement selected arbitration as the method by which any dispute between them should be determined. The award in the forum of their choice is final and conclusive and a court should not disturb it except on the grounds of one of the statutory provisions. Absent such an exception, the award may not be disturbed for error either of fact or law not evident on the fact of the award. . . . (citing cases) . . . Judicial review of an award is more limited than judicial review of a trial. *Bernhardt* v. *Polygraphic, supra; Wilko* v. *Swan,* 346 U. S. 427, 435-438.

"If an arbitrator may not be questioned as to the reasons underlying an award in order to impeach it, then by the same token he cannot be heard to impeach it upon the ground it does not reflect his intention. . . ."

See also:

Shirley Silk Co. v. *American Silk Mills,* 257 App. Div. 375, 13 N. Y. S. 2d 309 (1st Dept. 1939).

"There is no authority which sanctions an inquisition of arbitrators for the purpose of determining the processes by which they arrived at an award. An arbitrator who is a quasi judicial officer should not be called upon to give reasons for his decision" (257 App. Div. at p. 377).

To the same effect

Lief v. *Brodsky,* 126 N. Y. Supp. 2d 657, 658 (Sup. Ct., Bronx Co.—1953);

N. Y. Omnibus, 189 Misc. 892, (Sup. Ct. N. Y. Co. —1947).

The irrefutable presumption is that the arbitrators decided only "all claims submitted to this arbitration" [TR p. 95]. The only dispute submitted to them was that which the Appellee set forth in its demand, "the sum of $22,067.97, and each and every part thereof, *to the extent that said claim exceeds the sum of $6,000 . . .*" [TR p. 86]. The arbitrators never had jurisdiction of that latter claim (the first cause of action); it remained always with the District Court.

Conclusion.

Appellee in its demand for arbitration did not place in dispute Appellant's claim to the $6,000.00 demanded in the first cause of action. The Appellee merely sought an arbitration of and disputed Appellant's claim for $22,067.97 solely to the extent that it exceeded $6,000.00. This submission and demand was not ambiguous. The Appellee has admitted that there is no dispute that the $6,000.00 was due the Appellant.

The Appellee's demand for arbitration and the Appellant's answering statement were "the source and definition of the authority exercised by the arbitrators" (*Matter of TWU, supra,* pp. 10-11). The parties submitted but one dispute, *i.e.,* the excess over $6,000.00, the claim set forth in the second cause of action. The arbitration award was solely "in full settlement of all claims submitted to this arbitration"; that submission did not include the first cause of action.

The District Court erred in granting Appellee's motion for summary judgment and dismissing the complaint. The District Court erred in refusing to grant Appellant's motion for summary judgment in the sum of $6,000.00 with interest, as demanded in the first cause of action. The District Court solely and not the arbitrators had jurisdiction over the claim set forth in the first cause of action.

Therefore, in the absence of any question of fact as to the amount due under the first cause of action and in light of the indisputable fact that the first cause of action was not before the arbitrators, this Court should reverse the District Court and enter an order granting Appellant's motion for summary judgment on the first cause of action and grant judgment in the sum of $6,000.00 with interest at 6 per cent from September 18, 1959, to date.

Respectfully submitted,

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